No. 02-682

Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
*Petitioner*,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF FOR ALLEGIANCE TELECOM, INC., ATX COMMUNICATIONS, INC., FOCAL COMMUNICATIONS CORP., ICG COMMUNICATIONS, INC., PAC-WEST TELECOMM, INC., AND US LEC CORP. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

RICHARD M. RINDLER
*Counsel of Record*
ERIC J. BRANFMAN
REBECCA P. DICK
SWIDLER BERLIN
SHEREFF FRIEDMAN, LLP
3000 K STREET, N.W., SUITE 300
WASHINGTON, DC 20007
(202) 424-7500

*Attorneys for Amici Curiae Allegiance Telecom, Inc., ATX Communications, Inc., Focal Communications Corp., ICG Communications, Inc., Pac-West Telecom, Inc., and US LEC Corp.*

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KEVIN JOSEPH
Senior Vice President
Government & External
Affairs
ALLEGIANCE TELECOM, INC.
1919 M Street, N.W.
Washington, D.C. 20036
(202) 464-1789
*Counsel for Amicus Curiae Allegiance Telecom, Inc.*

CHRISTOPHER A. HOLT
Senior Vice President, Chief
Counsel for Law & External
Affairs & Secretary
ATX COMMUNICATIONS, INC.
75 Broad Street
11th Floor
New York, NY 10004
(212) 509-4135
*Counsel for Amicus Curiae ATX Communications, Inc.*

RICHARD METZGER
Senior Vice President & General
Counsel
FOCAL COMMUNICATIONS CORP.
7799 Leesburg Pike
210 North
Falls Church, VA 22043
*Counsel for Amicus Curiae Focal Communications Corp.*

BERNIE ZUROFF
General Counsel & Secretary
ICG COMMUNICATIONS, INC.
161 Inverness Drive West
Englewood, CO 80112
(888) 424-1144
*Counsel for Amicus Curiae ICG Communications, Inc.*

JOHN SUMPTER
Vice President, Regulatory
PAC-WEST TELECOMM, INC.
1776 W. March Lane
Suite 250
Stockton, CA 95207
(209) 926-3136
*Counsel for Amicus Curiae Pac-West Telecomm, Inc.*

MICHAEL L. SHOR
General Counsel
US LEC CORP.
Three Morrocroft Centre
6801 Morrison Boulevard
Charlotte, NC 28211
(703) 584-6828
*Counsel for Amicus Curiae US LEC Corp.*

## QUESTIONS PRESENTED

*Amici* will address: (1) whether persistent disruptions by a monopolist of the wholesale service it sells to competitors, where the disruptions impair the retail service the competitors provide to their customers, and where the customers can be expected to—and do—blame the competitors for the retail service problems, are fairly characterized as simply a passive refusal to deal by the monopolist;

(2) whether, if the allegations in this case are analyzed as a refusal to deal, long-standing antitrust precedent should be overturned, and a monopolist should be permitted unreasonably to refuse to do business with a competitor even if the refusal prevents competition and is not demonstrated to be part of any procompetitive business strategy;

(3) whether, despite the express antitrust savings clause in the Telecommunications Act of 1996, 47 U.S.C. § 152 note (§ 601(b), 110 Stat. 143) and the absence of "plain repugnancy" between that statute and the antitrust laws, incumbent telephone monopolists should be excused from compliance with Section Two of the Sherman Act, 15 U.S.C. § 2.

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## INTEREST OF *AMICI CURIAE* [1]

*Amici curiae* Allegiance Telecom, Inc., ATX Communications, Inc., Focal Communications Corp., ICG Communications, Inc., Pac-West Telecomm, Inc., and US LEC Corp. are competitive telephone companies known as competitive local exchange carriers, or "CLECs," that seek to compete with

[1] No one other than the named *amici* wrote this brief in whole or in part, or made any monetary contribution to its preparation. Both parties have filed blanket consents to the filing of *amicus* briefs.

incumbent monopoly telephone companies, or "ILECs," in markets for local telephone service throughout the United States. Although no CLEC is a party to this case, *amici* and other CLECs may be profoundly affected by its outcome. Some *amici* are currently litigating monopolization claims against ILECs, including Verizon Communications Inc. ("Verizon"). All *amici*, including those not currently involved in antitrust litigation, have a strong interest in ensuring that the antitrust laws continue to govern business conduct in local telephone markets. *Amici* will provide the Court with the CLECs' perspective on the hostile environment for competition in local telephone markets today, the ineffectiveness of regulation alone in preserving competitive conditions, and the antitrust standards that should constrain anticompetitive conduct by the incumbent monopolists.

As six of the most experienced CLECs in the nation, *amici* compete with and purchase services from ILECs, including Verizon. All *amici* serve retail customers. ATX, ICG, and Pac-West trace their origins to the mid-1980s and the telecommunications revolution sparked by the divestiture of AT&T's long-distance and equipment affiliates from its local service operations. Allegiance, Focal, and US LEC were founded shortly after passage of the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.* ("'96 Act"). Today Allegiance, Focal, and ICG operate in markets around the country. US LEC concentrates its operations in the southeast and the mid-Atlantic regions, ATX operates in the midwest and on the East Coast, and Pac-West operates on the West Coast.

Although each *amicus* has a different business model, all are in part facilities-based, meaning that they utilize some of their own equipment and facilities in serving customers, while at the same time seeking to use some equipment and facilities (particularly last-mile facilities) of the incumbent monopolist. The competition they seek to bring to the



marketplace can only survive where unreasonable conduct that preserves monopoly power, and that lacks a legitimate business justification, is prohibited.

## SUMMARY OF ARGUMENT

1. The conduct alleged in this case is not simply a passive refusal to deal, but affirmative activity by a monopolist creating a public misperception that its competitors' service is technically deficient. The complaint alleges that Verizon has repeatedly mishandled various aspects of wholesale service to CLECs, with the result that CLEC retail customers, including the plaintiff, receive inadequate service. Verizon/Trinko Joint Appendix ("J.A.") at 19, 29. In the experience of *amici*, ILEC disruptions of wholesale service are common and frequently in turn disrupt telephone service to CLEC retail customers. When this occurs, CLEC customers conclude that the fault lies with their CLEC provider; they do not blame the ILEC. All *amici* have lost customers as a result of ILEC wholesale service interruptions that their customers attributed to *amici*. Framing the issue in this case as no more than a passive refusal to deal ignores the allegations of affirmative mishandling of wholesale business by Verizon, mishandling that impairs the ability of Verizon's competitors to compete effectively and preserves Verizon's monopoly power.

2. The complaint alleges that Verizon lacks a legitimate business justification for its conduct, J.A. at 29, an allegation that must be accepted as true for the purposes of Verizon's motion to dismiss. *Hishon v. King & Spaulding*, 467 U.S. 69, 73 (1984); *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). The justification Verizon has advanced, even if proved, would not satisfy the legal standard under Section 2 of the Sherman Act, 15 U.S.C. § 2. Section 2 condemns unreasonable unilateral conduct by a monopolist that: (1) preserves monopoly power, and (2) does not make business sense for the monopolist but for its exclusionary effects, *i.e.*, does not improve the

monopolist's efficiency or the price or quality of its products. *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (*en banc*). Verizon suggests that the course it pursued was more profitable than less exclusionary conduct would have been, Brief for Petitioner ("Verizon Br.") at 26, but without more this does not qualify as a procompetitive justification and thus fails the test. *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601-05 (1985); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 378 (1973); *Lorain Journal Co. v. United States,* 342 U.S. 143, 155 (1951); *Microsoft,* 253 F.3d at 59. Monopoly is inherently more profitable than competition, and increased profits alone cannot be a defense to a charge of illegal monopolization. This principal applies to all § 2 cases, including those in which the specific conduct alleged is an unreasonable refusal to deal or denial of access to essential facilities. *United States v. American Tel. & Tel.*, 524 F. Supp. 1336, 1360-61 (D.D.C. 1981).

3. Congress expressly directed that the antitrust laws continue to govern local telephone markets by including an antitrust savings clause in the '96 Act. 47 U.S.C. § 152 note (§ 610(b), 110 Stat. 143). Moreover, the '96 Act and its associated regulations are intended to encourage competition, and thus are parallel in purpose to the Sherman Act. 47 U.S.C. §§ 251(c), 252, 271; *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4 (1958) (Sherman Act is a "comprehensive charter of economic liberty"). Where there is no "plain repugnancy" between a regulatory scheme and the antitrust laws, the antitrust laws are presumed to apply, even in the absence of an express savings clause. *E.g., United States v. Philadelphia Nat'l Bank,* 374 U.S. 321, 351 (1963); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963); *Southern Pac. Communications Co. v. American Tel. & Tel.*, 740 F.2d 980, 999 (D.C. Cir. 1984). To nevertheless excuse Verizon from compliance with the Sherman Act would depart from long-standing United States practice



regarding the treatment of regulated industries in general and the telecommunications industry in particular, and would flout Congressional intent.

## ARGUMENT

### I. VERIZON'S ARGUMENT IS BASED ON A FACTUAL CLAIM THAT CANNOT BE DECIDED ON A MOTION TO DISMISS

#### A. Incumbent Telephone Companies, Including Verizon, Retain Monopoly Power In Local Markets Everywhere, While Facing A Chorus Of Charges Of Anticompetitive Conduct

Seven years after passage of the '96 Act, monopoly remains ubiquitous in markets for local telephone service throughout the United States. With the exception of a handful of urban centers, in no area do the incumbent's customers purchase less than 70% of local lines, while the uniform experience of CLECs, including *amici*, is that successful, effective entry is extremely difficult. *See* Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2002,* Table 6 (June 12, 2003), *at* http://ftp.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0603.pdf. Numerous CLECs entered local markets in the wave of optimism created by the '96 Act, but more than 50 have now declared bankruptcy, and of over 300 facilities-based CLECs in business in 1999, only about 100 remain. Jeffrey A. Eisenach, *The Real Telecom Scandal*, Wall Street Journal (September 30, 2002); Association for Local Telecommunications Services, *The State of Local Competition 2003* (April 2003).

Of course, possession of monopoly power is not illegal unless the power was created or preserved by anticompetitive conduct. *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 482-483 (1992); *United States v. Griffith*, 334 U.S. 100, 107 (1948). However, many ILECs, including

Verizon, face serious allegations that they owe their continuing monopolies to anticompetitive behavior. For example, CLECs have formally alleged that Verizon has: (1) advised a CLEC and regulators that its conversion processes were reliable, then disrupted service to hundreds of CLEC customers when converting their service from resale to the CLEC's switch, First Amended Counterclaim, *Verizon Communications Inc. v. ATX Communications, Inc.*, No. 02-1374 (SLR) (D. Del. filed May 12, 2003) (pending); (2) without warning, terminated long distance access for numerous former Verizon customers that had decided to switch to a CLEC, *Verizon New Jersey, Inc. v. Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616, 630 (D.N.J. 2002) (complaint dismissed); and (3) repeatedly and without warning, failed to make wholesale service available on the dates promised, forcing a CLEC to notify its customers that installation of their retail service would be delayed, thereby causing the CLEC to lose business and damaging its reputation. Compl. ¶¶ 141-45, *Covad Communications Co. v. Bell Atlantic Corp.*, No. 1:99-CV-01046 (D.D.C. filed July 5, 2001) (stayed D.C. Ct. App.). Many CLEC antitrust claims have been interpreted, like the plaintiff's claims in this case, as an allegation that the ILEC's conduct is tantamount to an unreasonable refusal to deal with CLECs. As in this case, however, often the conduct alleged was not mere passive refusals, but affirmative actions that damaged CLEC reputations and thereby preserved ILEC monopolies.

In the past, markets for telephone equipment and long-distance service have been well-served by effective antitrust enforcement, to the great benefit of American commerce. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1983). Today, a number of companies seek to bring competition to local service markets, but they can do so if only antitrust law prohibits incumbents from blocking effective entry.



### B. Verizon's Claim That Its Conduct Makes Procompetitive Business Sense Raises A Question Of Fact That Cannot Be Resolved On This Motion To Dismiss

The plaintiff alleges that Verizon has dealt with competitors in unreasonable ways that disrupt their operations, thereby impeding their ability to compete effectively. J.A. at 29-30. Verizon says that its conduct makes business sense independently of its exclusionary effects. Verizon Br. at 26. This is a factual claim that cannot be resolved on a motion to dismiss. The complaint alleges that Verizon has "no legitimate business purpose" or "valid business reason" for its conduct, J.A. at 29, that it has attempted to exclude rivals "on a basis other than efficiency," *id.*, and that its conduct is "unnecessarily restrictive." *Id.* There is no record evidence and not even a formal pleading to the contrary. For purposes of this motion, the plaintiff's allegations must be accepted as true. *Hishon v. King & Spaulding*, 467 U.S. at 73; *Scheuer v. Rhodes*, 416 U.S. at 236; *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 38 (D.C. Cir. 2000); *Turbe v. Gov't of the Virgin Islands*, 938 F.2d 427, 428 (3rd Cir. 1991).

## II. THE ALLEGED CONDUCT GOES BEYOND REFUSALS TO DEAL, AND AMOUNTS TO AFFIRMATIVE DISRUPTION OF COMPETITION

The allegations in the complaint in this case, as with many other pending antitrust complaints against ILECs, assert much more than passive refusals to do business. The issue is whether Verizon disrupted wholesale service to its competitors, impairing aspects of their retail service to their customers in the process. *See, e.g.*, J.A. at 19. Verizon's misconduct allegedly occurred often enough and in so many forms that it made it difficult for competitors to compete effectively, J.A. at 29, thereby preserving Verizon's monopoly power.

In *amici*'s experience, when customers encounter unfamiliar service problems upon switching to CLEC service, they conclude that the fault lies with the CLEC. After all, most faced no similar service problems when they obtained service from an ILEC. When the service interruptions are serious, CLEC competition is weakened. Some customers remain with their CLEC but tell others of the technical problems they have encountered, discouraging potential customers from purchasing CLEC service. Some require CLECs to grant them credits or provide expensive work-arounds, such as free cellular telephones and air time until their CLEC landline service is finally in place. CLECs usually must absorb these costs and the accompanying administrative burdens, which distract them from their efforts to build their businesses. Some customers promptly switch back to ILEC service, again telling others of their unhappy experiences with a CLEC. Thus, by repeatedly and significantly disrupting the wholesale service it provides to CLECs and thereby impairing the retail service they can provide, an ILEC can preserve its monopoly power.

## III. UNDER WELL-ESTABLISHED ANTITRUST STANDARDS, WHERE A MONOPOLIST'S UNREASONABLE CONDUCT PRESERVES ITS MONOPOLY POWER, THE CONDUCT VIOLATES § 2 UNLESS IT MAKES PROCOMPETITIVE BUSINESS SENSE INDEPENDENTLY OF ITS EXCLUSIONARY EFFECTS

### A. Even If Proved, Verizon's Assertions Are Legally Insufficient

Unreasonable conduct by a monopolist that preserves its monopoly power violates § 2 of the Sherman Act unless it makes business sense for the monopolist independently of its exclusionary effects. *See Microsoft*, 253 F.3d at 59. On this motion to dismiss, Verizon implicitly concedes the first



element of this standard, that it preserves its monopoly power by dealing with CLECs in disruptive ways that prevent them from competing effectively, or by refusing to deal with them at regulated, compensatory rates. Verizon points out that its choice is between selling functional wholesale access that a CLEC can utilize in serving a retail customer, and selling retail service to the same customer itself. Verizon Br. at 26 n.23. In other words, if Verizon refuses to sell functional wholesale access to CLECs, retail customers—even if they prefer to obtain service from a CLEC—will be forced to turn to Verizon instead. Unless Verizon leases CLECs functional access to its network, especially the last mile,[2] there can be no effective competition in the provision of local telephone service.

The antitrust inquiry then turns to whether the challenged conduct makes legitimate business sense apart from its exclusionary effects. Verizon suggests that it earns higher profits by excluding CLECs. Verizon Br. at 26 n.23. But the relevant antitrust question is not *whether* the monopolist will earn more through the exclusionary conduct, since monopoly power generally increases profits. The question is *how* it will earn more: does the conduct enhance the monopolist's returns by enabling it to improve the price or quality of its service, or to improve the efficiency of its internal operations? *Microsoft*, 253 F.3d at 59. If so, the conduct will produce higher profits for the monopolist even apart from its effects in preserving monopoly power, and the monopolist will have preserved its market position through competition on the merits. But if the conduct provides no such procompetitive

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[2] While *amici* and some other CLECs are in part facilities-based, it is not now and will not in the foreseeable future be feasible for CLECs to build out their networks to cover the "last mile" between most customers and the nearest call distribution point, called an "end office" or "central office."

benefit, it does not make business sense except by depriving customers of choice.

As expressed by the unanimous *en banc* D.C. Circuit:

> . . . if a plaintiff successfully . . . demonstrat[es] anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the plaintiff to rebut that claim.

*Microsoft,* 253 F.3d at 59 (citations omitted). And the First Circuit has held:

> . . . a business justification is valid if it relates directly or indirectly to the enhancement of consumer welfare. Thus, pursuit of efficiency and quality control might be legitimate competitive reasons for an otherwise exclusionary refusal to deal, while the desire to maintain a monopoly market share or thwart the entry of competitors would not.

*Data Gen. Corp. v. Grumman Sys. Support Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994).

The notion that self-interest is a sufficient justification has been expressly rejected by this Court:

> 'The promotion of self-interest alone does not invoke the rule of reason to immunize otherwise illegal conduct.' [The Sherman] Act assumes that an enterprise will protect itself against loss by operating with superior service, lower costs, and improved efficiency. Otter Tail . . . sought to substitute for competition anticompetitive uses of its dominant economic power.

*Otter Tail*, 410 U.S. at 380 (citations omitted). Similarly, the Third Circuit has recently held that:



> . . . a defendant's assertion that it acted in furtherance of its economic interests does not constitute the type of business justification that is an acceptable defense to § 2 monopolization. Paraphrasing one corporate executive's well-publicized statement, whatever is good for [the company] . . . is not necessarily permissible under § 2 of the Sherman Act.

*LePage's Inc. v. 3M*, 324 F.3d 141, 163 (3d Cir. 2003), *petition for cert. filed,* 72 U.S.L.W. 3007 (U.S. June 20, 2003) (No. 02-1865).

Verizon has not explained how its conduct has increased its profits other than by forcing retail customers that would have preferred to purchase telephone service from a CLEC to purchase service from Verizon instead. Verizon has not described any way in which its conduct makes its products and services better or less expensive, or makes its internal processes more efficient. Thus, it has utterly failed to address the standard for evaluating unreasonable monopoly conduct that excludes competition.

The "makes business sense apart from exclusion" test is designed to ensure that a monopolist is able to compete aggressively, on the merits, to preserve its market position. *Microsoft*, 253 F.3d at 58-59. The test allows a monopolist to conduct its business in any way that is both rational and procompetitive, even if its success in that course of action protects and preserves its monopoly power. Consumers benefit if the monopolist is permitted to compete in procompetitive ways along with its smaller competitors, who by dint of their lack of market power usually cannot compete in any other manner. The standard only prohibits a monopolist from unreasonably excluding rivals "on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605, quoting Robert Bork, *The Antitrust Paradox* 138 (1978).

The standard does not, however, insulate conduct for which *any* business justification, no matter how negligible, can be

constructed, despite extreme language proposed by Verizon and some *amici* writing on its behalf. The fact that exclusionary conduct results in a minor savings for the monopolist would not protect the conduct if costs greater than those savings also result, that is, the conduct would not would be profitable *overall* absent its monopoly-preserving effects. Since it is possible to imagine some minor savings arising from virtually any type of business conduct, a standard that would permit any such savings, no matter how insignificant, to excuse exclusionary conduct would in practice free a monopolist from any antitrust constraint. Moreover, reliance on even insignificant savings would depart from the principle of protecting rational business behavior, since rational business people do not pursue an expensive course of action simply because of a minor associated benefit. The appropriate legal standard is whether the conduct is procompetitive and profit-maximizing overall. Thus, a rule that only conduct that makes *no* business sense apart from its competition-restricting effects can be challenged under § 2, if applied literally, would deny consumers antitrust protection from much monopolistic behavior and would reach well beyond the goal of protecting monopolists' ability to compete in rational, procompetitive ways.

### 1. *Unreasonable Refusals To Deal Are Judged By The Same "Procompetitive Business Sense" Standard As Other Exclusionary Conduct That Preserves Monopoly Power*

Verizon treats this case as one involving refusals to deal. Verizon Br. at 17-20. Refusal-to-deal precedent applies the same "procompetitive business sense" standard as other §2 cases described above. Where the refusals are unreasonable and preserve monopoly power, they are suspect, since in the absence of restraints on competition, companies generally want to maximize their sales in order to maximize their profits. *Olympia Equip. Leasing Co. v. Western Union Tel.*



*Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.).[3] Thus, the examination of a proffered procompetitive justification must be a careful one.

In *Aspen Skiing*, the absence of a procompetitive, efficiency-based justification was decisive. A ski resort monopolist owning three slopes in Aspen ceased selling a six-day lift ticket in conjunction with its rival, which owned the remaining slope in Aspen. The joint ticket had enabled the holder to ski on any of the four Aspen slopes on each of six days. While the Court examined the monopolist's prior participation in the joint ticket, this history was important solely because the prior course of conduct was evidence of where the monopolist's legitimate business interests lay. The Court also emphasized the fact that in competitive ski markets, joint tickets are common. The Court looked to whether there was an efficiency-based justification for the defendant's refusal to participate in the joint ticket, and found the jury's negative answer to be supported by the evidence. The Court's articulation of the governing standard emphasized that the efficiency of the challenged conduct is determinative, and liability attaches where the defendant is not driven by "efficiency concerns and . . . [is] willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." 472 U.S. at 610-11.

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[3] Refusals to deal that are not unreasonable—such as refusals to sell below cost or to sell in furtherance of a scheme to defraud—cannot form the basis of § 2 liability. *See, e.g., Homefinders of America, Inc. v. Providence Journal Co.*, 621 F.2d 441 (1st Cir. 1980) (deceptive character of plaintiff's real estate listings a valid reason for refusal to publish advertisements). The sales involved in this case, however, were at regulated rates, already held by the FCC (and in the case of TELRIC rates, by this Court) to be reasonably compensatory. *See Verizon Communications Inc. v. FCC*, 535 U.S. 467 (2002).

The monopolist Aspen Skiing was in a position similar to that of Verizon here: by refusing to sell joint tickets, Aspen Skiing could force most of the customers who would have purchased joint tickets to purchase Aspen-Skiing-only tickets instead. By refusing to do business on reasonable terms with its competitor, Aspen Skiing increased the sales of its own tickets and earned higher profits in the long run. It gave up its share of revenue from the joint tickets but gained revenue from increased sales of Aspen-Skiing-only tickets and increased usage of its associated services, such as its ski school, ski rentals, racing events, and restaurants.[4] Aspen Skiing's refusal to deal on reasonable terms was nevertheless condemned by the Court because it preserved monopoly power and did not improve the quality or price of Aspen Skiing's products or operations. 472 U.S. at 608-09.

In *Lorain Journal*, a monopoly newspaper refused to accept advertising from customers that also purchased advertising time on a new local radio station. It offered no explanation of why the refusal made business sense apart from its exclusionary effects, but instead relied on the right of every business to "select its customers." *Lorain Journal,* 342 U.S. at 155. The Court wrote:

> '[T]he word "right" is one of the most deceptive of pitfalls; it is so easy to slip from a qualified meaning in the premise to an unqualified one in the conclusion. Most rights are qualified.' The right claimed by the [Lorain Journal] . . . is neither absolute nor exempt from regulation. Its exercise as a purposeful means of

[4] The Court's opinion does not provide figures for Aspen Skiing's revenues, but upon termination of the joint ticket, its competitor's market share fell from 20.5% to 11% in four years and the latter's revenues from associated services "declined sharply as well." 472 U.S. at 594-95. Likely a significant amount, if not all, of this lost revenue was shifted to Aspen Skiing.



> monopolizing interstate commerce is prohibited by the Sherman Act.

*Id.* (citations omitted).

In lieu of advancing any explanation of how its conduct is procompetitive and therefore makes business sense apart from its exclusionary effects, Verizon raises a variety of arguments that, if accepted by the Court, would excuse it from having to demonstrate such a justification. These arguments are based on its characterization of the plaintiff's claim as one for refusals to deal, a description that, as explained above, ignores the thrust of the allegations. The arguments also conflict with established antitrust precedent about refusals to deal.

First, Verizon suggests that the antitrust laws do not require it to sell services at wholesale if it has never done so before. Verizon Br. at 18. This argument cannot be squared with *Otter Tail.* 410 U.S. 366. There the monopolist refused either to wheel wholesale electric power from other sellers or to itself sell power at wholesale to would-be municipal power authorities, thereby forcing those towns to accept it as their retail power distributor. While Otter Tail was regularly in the business of wheeling power for itself and others, it sold little power at wholesale: Otter Tail's "business . . . [was] almost exclusively retail." *United States v. Otter Tail Power Co.*, 331 F. Supp. 54, 56 (D. Minn. 1971). Yet its refusal to sell power at wholesale to potential retail competitors was condemned by the courts along with its refusal to wheel power to those entities. The provision in the district court's injunction barring Otter Tail from refusing to sell wholesale power, Sec. IVA, Amended Judgment, 1971 U.S. Dist. LEXIS 10845 (D. Minn. 1971), was upheld by the Supreme Court. 410 U.S. at 382. Otter Tail's refusal to sell power at

wholesale to competitors parallels the conduct alleged in this case.[5]

Moreover, Verizon's suggestion that it never sold services at wholesale until required to do so by the '96 Act, Verizon Br. at 19-20, raises an additional issue of fact not established in the record and inappropriately raised on a Rule 12(b)(6) motion to dismiss. Competitive access providers existed in some Verizon states prior to 1996. Some incumbents, including Verizon's predecessor, NYNEX Corporation, did business with them. Moreover, on occasion NYNEX engaged in a variety of arrangements with long-distance companies. Verizon's argument cannot be evaluated in the absence of evidence about the nature and scope of the wholesale services provided by its predecessors prior to passage of the '96 Act.

Verizon emphasizes that the CLEC involved in this case is a reseller, contending that the antitrust laws are less concerned about anticompetitive behavior that drives resellers out of a market than about similar behavior directed at competitors that operate their own facilities. Verizon Br. at 30. This claim is unfounded as a legal matter, but more importantly, the arguments Verizon advances contain no such limitation—they would apply with equal force to all competitors. Even a firm that utilized only its own facilities throughout, including over the last mile, would have to interconnect with Verizon in order for its customers to receive calls from Verizon customers and complete calls to them. If Verizon had no antitrust obligation to deal on

[5] The Fourth Circuit recently wrote that Otter Tail "*was* in the business of . . . selling electricity at wholesale," *Cavalier Tel., LLC v. Verizon Virginia, Inc.*, 330 F.3d 176, 187 (4th Cir. 2003) (emphasis in original), but the pages of the Supreme Court's opinion that it cites mention only Otter Tail's existing wheeling and retail sales businesses, not any ongoing sales of power at wholesale.



reasonable terms with a competitor, as it contends, then it would not have to interconnect even with a wholly facilities-based competitor unless regulation effectively compelled it to. There would be no antitrust backstop in the event the regulatory scheme proved unable to protect competition, as has occurred all too frequently in the past.

Verizon further contends that refusals of the sort it reads into the complaint are a different "class" of conduct than anything previously condemned under § 2 of the Sherman Act. Verizon Br. at 16. But the categories of antitrust misconduct are not narrowly circumscribed; "the means of illicit exclusion, like the means of legitimate competition, are myriad." *Microsoft*, 253 F.3d at 58. Defining categories and then assigning conduct to one or another of them would divert attention from the main antitrust issue, whether a monopolist's conduct unreasonably preserved its market power. One of the strengths of the United States antitrust laws has been their consistent focus on whether challenged conduct is actually anticompetitive, without undue reliance on predefined categories. *See, e.g., Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985). This analysis maximizes the strategic flexibility of all businesses, regardless of market share, while ensuring that anticompetitive conduct does not escape condemnation.

### 2. *Essential facilities analysis proceeds under the same "procompetitive business sense" standard*

The essential facilities doctrine is an older variant of refusal-to-deal principles and is analytically consistent with them. It has been adopted in every circuit and is well-established in antitrust jurisprudence.[6] The fourth element of

[6] *See, e.g., Interface Group, Inc. v. Massachusetts Port Authority*, 816 F.2d 9, 12 (1st Cir. 1987); *Delaware & Hudson Ry. Co. v. Consolidated*

an essential facilities claim, that it would be feasible for the monopolist to permit access, is, as applied by the courts, the equivalent of the legitimate business justification standard applicable in refusal-to-deal cases. *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983). The analysis was succinctly expressed in the *AT&T* case:

> [P]roblems of feasibility and practicability may be taken into account by the Court in determining the sufficiency under the law of the access to essential facilities granted by defendants to non-Bell carriers. To put it another way, parity is not necessarily required. But . . . AT&T and its subsidiaries now discriminate between Long Lines and non-Bell carriers with regard to access to Bell System facilities. . . . this discrimination [is] anticompetitive in its effect. . . . The burden is now upon defendants to show why, despite that

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*Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990); *Ideal Dairy Farms, Inc. v. John Labatt, Ltd.*, 90 F.3d 737, 748 (3rd Cir. 1996); *Advanced Health Care Servs. v. Radford Community Hosp.*, 910 F.2d 139, 150 (4th Cir. 1990); *Mid-Texas Communications Sys., Inc., v. American Tel. & Tel. Co.*, 615 F.2d 1372, 1387 n.12 (5th Cir. 1980); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 612 (6th Cir. 1987); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983); *City of Malden v. Union Elec. Co.*, 887 F.2d 157, 160 (8th Cir. 1989); *City of Anaheim v. Southern California Edison Co.*, 955 F.2d 1373, 1380 (9th Cir. 1992); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 738 F.2d 1509, 1520 (10th Cir. 1984), *aff'd on other grounds*, 472 U.S. 585 (1985); *Covad Communications Co. v. BellSouth Corp.*, 299 F.3d 1272, 1285 (11th Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3640 (U.S. Mar. 20, 2003) (No. 02-1423); *Caribbean Broadcasting Sys., Ltd. v. Cable & Wireless PLC*, 148 F. 3d 1080, 1088 (D.C. Cir. 1998); *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1356-58 (Fed. Cir. 1999). *See also* Robert Pitofsky, Donna Patterson, and Jonathan Hooks, *The Essential Facilities Doctrine Under U.S. Antitrust Law*, 70 Antitrust L. J. 443 (2002).



> anticompetitive impact, such unequal treatment is reasonable . . . .

*U.S. v. AT&T*, 524 F. Supp. at 1361.

The essential facilities doctrine has been applied repeatedly to local telephone networks. Such a network remains the paradigm of an essential facility: it cannot be feasibly duplicated, yet access to it is essential for competition in related service markets. Application of the doctrine has produced significant competitive benefits, greatly enhancing the reliability, capacity, and efficiency of this nation's long-distance telephone communications and its telephone equipment markets. *Southern Pac. Communications*, 740 F.2d 980; *MCI v. AT&T*, 708 F.2d 1081; *U.S. v. AT&T*, 552 F. Supp. 131.

## IV. CONGRESS HAS MANDATED THAT THE ANTITRUST LAWS CONTINUE TO APPLY TO TELEPHONY, AND EVEN IF IT HAD NOT, THOSE LAWS WOULD APPLY BECAUSE THERE IS NO "PLAIN REPUGNANCY" BETWEEN THE ANTITRUST LAWS AND THE REGULATORY SCHEME ESTABLISHED BY THE '96 ACT

### A. The Antitrust Laws Govern Local Telephony

The antitrust laws apply to telephony, as they do to most regulated industries. The regulatory and antitrust regimes work together, each in its own way, to foster competition. The '96 Act expressly provides that nothing therein:

> shall be construed to modify, impair or supersede the applicability of any of the antitrust laws.

47 U.S.C. § 152 note. This was recognized by then-President Clinton when he signed the '96 Act into law:

> The Act's . . . antitrust savings clause . . . ensures that even for activities allowed under or required by the

> legislation, or activities resulting from FCC rulemakings or orders, the antitrust laws continue to apply fully.

Remarks on Signing the Telecommunications Act of 1996, 1996 Pub. Papers, vol. 1 at 189 (Feb. 8, 1996). In its initial order regarding the '96 Act, the FCC stated its view that the antitrust laws remain in force:

> Finally, we clarify, as one commenter requested, that nothing in sections 251 and 252 or our implementing regulations is intended to limit the ability of persons to seek relief under the antitrust laws, other statutes, or common law.

In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket 96-98, *First Report and Order*, 11 FCC Rcd. 15499, 15565 (Aug. 8, 1996). This remains the FCC's position today. It has urged the courts to recognize the continuing applicability of the antitrust laws:

> . . . a violation of the 1996 Act is not necessarily a violation of the antitrust laws . . . [b]ut . . . neither does the 1996 Act bar claims that satisfy established antitrust standards . . . . Even if Congress had not clearly expressed its intent, well-established law would preclude construing the 1996 Act to effect an implied repeal of the Sherman Act absent a 'convincing showing of clear repugnancy between the antitrust laws and the regulatory system' . . . . [N]othing in the 1996 Act suggests a 'plain repugnancy' . . . between that Act and the antitrust laws, both of which are 'competition-friendly.'

Amicus Brief of the United States and the Federal Communications Commission, *Covad Communications Co. v. Bell Atlantic Corp.*, No. 02-7057, Dec. 17, 2002 (D.C. Cir.), *available at* http://www.usdoj.gov/atr/cases/f200500/200567.htm (citations omitted).

Regulation alone often cannot prevent anticompetitive abuses by a monopolist. *See U.S. v. AT&T*, 524 F. Supp. at



1347. In other long-monopolized telephony markets, effective entry was accomplished only following firm application of the antitrust laws. It is commonplace for the antitrust laws to remain in place in other industries as well, even in the face of a pervasive regulatory scheme. *See e.g., Silver v. New York Stock Exch.*, 373 U.S. at 357 (securities). In drafting the '96 Act, Congress could not have made more clear its determination that the antitrust laws should continue to apply to local telephony, as they have for decades. The Court should reject any invitation to reverse this clear congressional choice.

### B. Application Of The Antitrust Laws Promotes Investment

Verizon asserts that requiring it to permit CLECs to lease its facilities discourages CLECs from investing in telephone infrastructure of their own. Verizon Br. at 27-28. This argument has already been rejected by this Court, which noted that it "founders on fact." *Verizon v. FCC*, 535 U.S. at 516.

Between 1996 and 2000, CLECs invested some $55 billion in telecommunications facilities. As the Court observed, "a regulatory scheme that can boast such substantial capital spending over a 4-year period is not easily described as an unreasonable way to promote competitive investment in facilities." *Id.* at 1676. Similarly, antitrust principles that promote the same practices as the regulatory scheme cannot fairly be described as unreasonably deterring investment.

Moreover, *not* requiring Verizon to lease its last-mile facilities would bring CLEC investment in facilities to a standstill. There is no prospect that it will ever be cost-effective for a CLEC to duplicate the last mile between a local telephone end office and the customer's premises. Without the ability to lease access to the last mile, CLECs cannot feasibly reach most customers. CLEC investment in

infrastructure at the center of the network, behind the last mile, would be foolhardy unless CLECs' ability to lease functional access to customers over the last mile was assured.

Verizon also contends that the requirement that it lease its facilities unless it has a legitimate reason not to dilutes its incentives to make investments in infrastructure of its own. Verizon Br. at 27. Historical experience demonstrates, however, that competitive pressure is the greatest spur to investment, while the prospect of unchallenged market dominance invites complacency. Fiber-optic technology was developed in the early 1970s. While the market for long-distance telephone service remained solely in AT&T's hands, however, there was no competitive urgency for it to undertake expensive improvements in its long-distance network and it did not do so. New competitors, entering long-distance after AT&T divested its equipment and local service affiliates, installed the first fiber-optic cable networks for long-distance telephone service in the United States. Robert E. Litan, *Antitrust Enforcement, in* Revolution in the U.S. Information Infrastructure (Nat'l Academy of Engineering, 1995). Only then did AT&T begin to upgrade its own network with fiber. *Id.*

### C. The Courts Provide An Appropriate Forum For Resolving Antitrust Claims

In determining liability in this case, the focus of the court's inquiry will be whether the conduct alleged is of the nature and scope of an antitrust violation. This is inherently not a regulatory inquiry, and regulatory processes are not particularly suited to evaluating it. Courts have for decades assessed claims of antitrust violations in regulated industries, and in the process have repeatedly cured significant anticompetitive conduct that regulators were not equipped to address.



*Town of Concord v. Boston Edison Co.*, 915 F.2d 17 (1st Cir. 1990) (Breyer, J.), is not to the contrary. That decision involved a price squeeze, a claim that presents unique difficulties—including the possibility that imposing liability could cause consumer prices to rise. There is no price squeeze claim in this case and no risk that the outcome will result in increased consumer prices. Moreover, *Town of Concord* concerned prices that had been expressly approved by regulators and upheld by a federal court of appeals in a proceeding in which the plaintiffs had actively participated. Here, in contrast, the challenged conduct has been condemned by regulators and the plaintiff has no opportunity to seek relief in a regulatory forum.

In designing injunctive relief, the existence of a regulatory scheme makes application of refusal-to-deal principles more feasible, not less. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989). Existing regulations can be used as guidance, and unresolved issues requiring regulatory processes and expertise can be referred by the court to the appropriate agency. Or a court can confine itself to general injunctive relief, setting outside limits but avoiding excessively regulatory detail.

In determining damages, the court will have no cause and no opportunity to design a regulatory scheme. It will be confined to determining the extent of the plaintiff's damages, attributable here to the difference in quality between the service the plaintiff would have enjoyed in the absence of the alleged misconduct, and the service it in fact received. This is an inquiry that courts and juries are well qualified to resolve.

Verizon also argues that judicial intervention is unnecessary to preserve competition in local telephone markets because of the pervasiveness of the regulatory scheme. The plaintiff's claim, however, is to the contrary—that antitrust

violations have occurred despite regulatory oversight. Verizon's argument presumes the outcome of the plaintiff's case without the benefit of evidence. If the plaintiff ultimately proves its case, it would not be the first time that regulation has failed to prevent antitrust violations in telephone markets.

Verizon's dire predictions about the consequences of litigating this case are unduly alarmist. Courts have long handled both the liability and relief stages of antitrust claims in regulated industries without venturing into territory more appropriately the province of regulators. *See e.g., Otter Tail*, 410 U.S. at 372 (electricity); *Carnation Co. v. Pacific Westbound Conf.*, 383 U.S. 213, 217-18 (1966) (shipping); *Silver v. New York Stock Exch.*, 373 U.S. at 357 (securities); *United States v. Radio Corp. of America*, 358 U.S. 334 (1959) (broadcasting); *United States v. Borden Co.*, 308 U.S. 188, 198 (1939) (agriculture); *Aloha Airlines, Inc. v. Hawaiian Airlines Inc.*, 349 F. Supp. 1064, 1068 (D. Haw. 1972) (air travel). There is no sound reason to doubt the courts' ability to handle this case appropriately.

### D. De Facto Immunity Would Conflict With Congressional Intent And Constitute Bad Policy

While Verizon disclaims any intention to seek immunity from the antitrust laws, the standard it urges on the Court would insulate it from antitrust challenge as completely as would immunity. A conclusion that courts are ill-equipped to assess antitrust violations in regulated industries, and that regulatory bodies offer the only appropriate forum for competitive issues in these industries, would preclude the bringing of any antitrust claims.

Those unable to bring a regulatory claim, such as the plaintiff in this case, would be entirely without remedy. And conduct that is outside the jurisdiction of the regulators but



affects competition in local telephony, such as is raised in a number of CLEC antitrust claims against ILECs, might be protected from antitrust challenge as well.

Moreover, regulatory processes are designed to produce narrow solutions to individual problems, not to address broad patterns of conduct. Regulatory processes can neither effectively assess such patterns nor provide effective relief where appropriate.

What Verizon seeks is immunity in everything but name. Adoption of the analysis it advocates would conflict with the clearly expressed will of Congress, which was based on decades of experience with the benefits to be gained from effective antitrust enforcement in telephone markets.

## CONCLUSION

Established precedent, sound antitrust principles, and clear statutory directives warrant affirmance of the appellate court's decision in directing the denial of Verizon's motion to dismiss. Verizon urges this Court to sweep aside long-standing and well-reasoned antitrust authority on exclusionary conduct that maintains monopoly power, significantly loosening constraints on anticompetitive conduct by monopolists across the entire spectrum of the economy. Its alternative argument, that courts are not well-suited to evaluate antitrust claims in regulated industries and especially in local telephony, conflicts with the will of Congress and would mark a sharp break with a long and successful history of antitrust enforcement in other telephone markets.

These far-reaching arguments arise in the context of a skeletal complaint that is before the Court on a motion to dismiss. There is only a general description of most of the misconduct alleged, no evidentiary support for the factual assertions on which Verizon relies, and indeed no evidentiary record whatsoever. Thus, there is little by which to assess the

scope, nature, and effects of the conduct Verizon has allegedly undertaken.

Moreover, there is nothing by which to assess the existence of a legitimate business justification for Verizon's alleged actions. A monopolist may not engage in unreasonable conduct that prevents competition unless the conduct is procompetitive or efficiency-enhancing—it improves the cost or quality of its products or services or improves the internal efficiency of its operations. Verizon has not asserted, much less established, that it meets this standard, and therefore the decision of the Second Circuit should be affirmed.

Respectfully submitted,

RICHARD M. RINDLER
*Counsel of Record*
ERIC J. BRANFMAN
REBECCA P. DICK
SWIDLER BERLIN
SHEREFF FRIEDMAN, LLP
3000 K STREET, N.W., SUITE 300
WASHINGTON, DC 20007
(202) 424-7500

*Attorneys for Amici Curiae Allegiance Telecom, Inc., ATX Communications, Inc., Focal Communications Corp., ICG Communications, Inc., Pac-West Telecom, Inc., and US LEC Corp.*



KEVIN JOSEPH
Senior Vice President
Government & External Affairs
ALLEGIANCE TELECOM, INC.
1919 M Street, N.W.
Washington, D.C. 20036
(202) 464-1789
*Counsel for Amicus Curiae Allegiance Telecom, Inc.*

CHRISTOPHER A. HOLT
Senior Vice President, Chief Counsel for Law & External Affairs & Secretary
ATX COMMUNICATIONS, INC.
75 Broad Street
11th Floor
New York, NY 10004
(212) 509-4135
*Counsel for Amicus Curiae ATX Communications, Inc.*

RICHARD METZGER
Senior Vice President & General Counsel
FOCAL COMMUNICATIONS CORP.
7799 Leesburg Pike
210 North
Falls Church, VA 22043
*Counsel for Amicus Curiae Focal Communications Corp.*

BERNIE ZUROFF
General Counsel & Secretary
ICG COMMUNICATIONS, INC.
161 Inverness Drive West
Englewood, CO 80112
(888) 424-1144
*Counsel for Amicus Curiae ICG Communications, Inc.*

JOHN SUMPTER
Vice President, Regulatory
PAC-WEST TELECOMM, INC.
1776 W. March Lane
Suite 250
Stockton, CA 95207
(209) 926-3136
*Counsel for Amicus Curiae Pac-West Telecomm, Inc.*

MICHAEL L. SHOR
General Counsel
US LEC CORP.
Three Morrocroft Centre
6801 Morrison Boulevard
Charlotte, NC 28211
(703) 584-6828
*Counsel for Amicus Curiae US LEC Corp.*